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No. 99-___

In The

Supreme Court of the United States

SHEILA TARANTO, d/b/a TUNDRA TAXI,

Petitioner,

v.

NORTH SLOPE BOROUGH,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Alaska

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does the actual malice standard established in *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), protect, governmental speech?

LIST OF PARTIES

All parties appear in the caption of this case on the cover page. The North Slope Borough is a governmental entity authorized by the laws of the State of Alaska. Alaska Constitution, Article 10, § 3, Alaska Statute § 29.05.031.

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PETITION FOR A WRIT OF CERTIORARI

Sheila Taranto, d/b/a Tundra Taxi, petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Alaska in this case.

OPINION BELOW

The opinion of the Alaska Supreme Court, the highest court to review the merits, appears at APPENDIX A, App. 1 and is designated for publication but is not yet reported.

The order granting summary judgment and determining the law of the case of the Superior Court For the Second Judicial District at Barrow Alaska is an unpublished order reprinted in its entirety as APPENDIX B. App. 13.

JURISDICTION

The opinion of the Supreme Court of the State of Alaska was entered on December 17, 1999. App. 1. No petition for rehearing was sought.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Article I, § 5 of the Alaska Constitution provides:

> Freedom of Speech. Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

STATEMENT OF THE CASE

The North Slope Borough clerk wrote and publicly displayed in the Borough offices, a petition accusing Sheila Taranto, a Barrow taxicab operator, of illegal sales of alcohol and drugs.

In January of 1992, Ms. Taranto sued the North Slope Borough for defamation. The North Slope Borough successfully moved for complete summary judgment, but the trial court was reversed on appeal in a decision of the Alaska Supreme Court faulting the trial court for granting summary judgment generally on procedural grounds. *Taranto v. North Slope Borough*, 909 P.2d 354 (Alaska 1996) [*Taranto I*].

Significantly, in *Taranto I* the court noted

> In regard to Taranto's direct and respondeat superior theories of liability against the Borough, we initially note that this court has stated that "the liability of a municipality for the negligent acts and omissions of its representatives will be governed by traditional tort principles." *Busby v. Municipality of Anchorage*, 741 P.2d 230, 232 (Alaska 1987). **Further, though defamation suits against the state are prohibited by the Tort Claims Act, defamation suits against incorporated units of local government are not prohibited**. *Taranto v. North Slope Borough*, 909 P.2d 354, 357 (Alaska 1996) (footnotes omitted, emphasis added.)

In January 1997, the North Slope Borough moved to establish as law of the case a requirement that Taranto prove "actual malice" to prevail on her defamation claim. The North Slope Borough concurrently moved for summary judgment, arguing that Taranto could not establish actual malice. The trial court granted both motions and dismissed Taranto's defamation claim.

It was in these proceedings on remand that the North Slope Borough for the first time moved for complete summary judgment on the theory that the actual malice standard established in *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), was applicable to the Borough Clerk's actions.

The trial court accepted that the *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), standard was applicable. The trial court granted complete summary judgment and expressly found the statements

of criminal conduct were matters of public interest insulating the North Slope Borough from liability for its actions absent a showing of actual malice. App. 21.

The Alaska Supreme Court affirmed holding that actual malice is the appropriate standard for determining whether governmental speech on matters of public interest is actionable, now basing this on a projected common law principle.[1]

The true substance of the decision in *Taranto II* is to extend a carefully defined constitutional scheme of individual liberty reflected in *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), and subsequent cases, to governmental action and speech.

REASONS FOR GRANTING THE WRIT

1. The decision of the Alaska Supreme Court that decided, interpreted, and applied important federal questions in a way that conflicts with relevant decisions of this court.

At first blush, the Alaska Supreme Court articulating a standard of actual malice as a matter of common law in a defamation action would not appear to generate an issue of Federal concern. This is not so.

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[1] "We need not decide here whether the United States or Alaska constitutions protect government speech, because this court has held that the common law confers a conditional privilege on speech addressing matters of public health and safety." *Urethane Specialties, Inc. v. City of Valdez*, 620 P.2d 683 (Alaska 1980); *Pearson v. Fairbanks Publ'g Co.*, 413 P.2d 711 (Alaska 1966); *Fairbanks Publ'g Co. v. Francisco*, 390 P.2d 784, 793 (Alaska 1964).

Free speech issues under the United States and Alaska Constitutions are expressly and preeminently matters of an individual's right.

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Article I, § 5 of the Alaska Constitution provides:

> Freedom of Speech. Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

The effect of this decision is to change the long line of cases that have occurred since *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), converting what has been a careful balance and shield of individual speech designed to promote public discourse while respecting an individual's right or privacy or reputation, to a sword which can be wielded with impunity by government against its own citizens.

The impossiblilty of **ever** proving actual malice of a government makes this question one of extraordinary significance in protecting individuals from an indifferent or hostile government.

Governmental speech is protected by a myriad of privileges and immunities. Governmental speech has no need for the "actual malice" standard promulgated in *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11

L.Ed.2d 686 (1964), and its progeny concerning free speech about public officials.

Governmental speech has no need for the doctrine stated by the Alaska Supreme Court in *West v. Northern Publishing Co.*, 487 P.2d 1304 (Alaska 1971), concerning free speech about matters of public concern or interest.

Initially it is important to consider what this case does not concern. This is not a case involving common-law privilege pertaining to matters of public interest protected a government's issuance of warning to its citizens within the perimeters of the issuing governmental official's authority.[2]

This is not a case involving a syndicated columnist suing a newspaper over the content of an editorial column on a matter of contemporary political concern.[3]

The right of the press or an individual to speak is distinctly and radically different from the right of government.

This was clearly and succinctly stated in *Columbia Broadcasting Systems, Inc. v. Democratic National Committee*, 412 U.S. 94, 139, 93 S.Ct. 2080, 2104, 36 L.Ed.2d 772 (1973), where Justice Stewart in a concurring opinion noted:

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[2] *Urethane Specialities, Inc. v. City of Valdez*, 620 P.2d 683, 689 (Alaska 1980)

> An occasion makes a publication conditionally privileged if an inferior administrative officer of a state or any of its subdivisions makes a defamatory communication required or permitted in the performance of his official duties.

[3] *Pearson v. Fairbanks Pub. Co.*, 413 P.2d 711 (Alaska 1966).

> The First Amendment protects the press from governmental interference; it confers no analogous protection on the government.

Similarly, the right of government to engage in public discourse cannot be predicated on a constitutional footing.

> Free speech has focused on the government as censor; it has little to say about the process by which the government adds its voice to the market place.
>
> . . . .
>
> Indeed, the "First Amendment protects the press from governmental interference, it confers no analogous protection on the government." (Citations omitted and citing *Columbia Broadcasting) National Association for the Advancement of Colored People (NAACP) v. Hunt*, 891 F.2d 1555, 1565 (11th Cir. 1990).

The right to engage in public discourse is not to find that a governmental entity has First Amendment standing.

> Only a few cases address the question whether municipalities or other state subdivisions or agencies have any First Amendment rights. All but one, and that not a case against a municipality, answer "no."
>
> *Creek v. Village of Westhaven*, 80 F.3d 186, 192 (7th Cir. 1996).

It is important to recall that the common law history of suits against government is one of sovereign immunity from any legal redress by its citizens. The statutory scheme in Alaska is similar to most states and the Federal

Tort Claims Act,[4] and is inherently statutory and legislative in content. The government is characteristically immune from suit, and right to sue exists only to the extent granted by legislative act, or in Alaska, State Constitutional provision and legislative act.

> We begin by noting historically the doctrine of sovereign immunity, which was grounded in the ancient maxim that the king can do no wrong, operated as a bar to claims brought against the state. As the doctrine developed in the United States, states began to permit suits against themselves as long as they were brought in a manner and in the courts prescribed by law.
>
> The State of Alaska provides for suits against the State in Article II, § 21, of its Constitution:
>
> > Suits against the State. The legislature shall establish procedures for suits against the State.

State v. Zia, Inc., 556 P.2d 1257, 1260 (Alaska 1976).

It is similarly well settled in Alaska, as in most jurisdictions, that a statutory scheme in derogation of the common law must be strictly construed.

> . . . statutes in derogation of the common law should be construed strictly. That is, when courts are presented with a question involving the proper construction of a statute that modifies the common law, the normal rule of interpretation is that such statutes are construed so as to preserve the pre-existing common law

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[4] 28 U.S.C.A. § 2680(a).

> unless the legislature has clearly indicated its purpose to change that law.

State v. ABC Towing, 954 P.2d 575, 579 (Alaska App. 1998).

The legislature has expressly recognized defamation suits in the circumstances encountered by Sheila Taranto in this case.[5]

Against a common law norm of sovereign immunity, and an express statutory right, the Alaska Supreme Court proposes an actual malice standard as a common law prerogative. This is simply impossible.

The decision of the Alaska Supreme Court is in real terms providing recognition of a right to governmental speech in constitutional terms.

The pernicious effect of converting the Bill of Rights, and in particular the First Amendment, into a tool of governmental authority, can only be imagined. The salutary effect of free speech and unfettered public discourse on democratic institutions is distinctly different from a government constitutionally insulated in their attack on a citizen.

Tort claim statutes can be changed in due course given popular political will. Constitutional protections are not nearly so malleable. To allow this decision to go

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[5] *Taranto I*: Further, though defamation suits against the state are prohibited by the Tort Claims Act, defamation suits against incorporated units of local government are not prohibited. *Taranto v. North Slope Borough*, 909 P.2d 354, 357 (Alaska 1996).

unchecked is to open the door to setting the First Amendment on its end. The dangers of constitutionally protecting governmental speech are apparent.

> [T]he State plays an important role as a participant in the market place of ideas. It can speak directly, encouraging certain activities (environmental conservation, for example) while discouraging others (narcotics and smoking for example). It can also speak indirectly by, subsidizing certain speech (for example, public school teaching) and refusing to subsidize other speech (for example, lobbying) **There is no question that unfettered government speech can be dangerous to our democratic society. "The power to teach, inform, and lead is also the power to indoctrinate, distort judgment, and perpetuate the current regime."** (Citations omitted, emphasis added). *The Student Government Association v. The Board of Trustees of the University of Massachusetts*, 868 F.2d 473, 482 (1st Cir. 1989).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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*Counsel of Record Counsel for Petitioner

APPENDIX A

Notice: This opinion is subject to correction before publication in the Pacific Reporter. Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, phone (907) 264-0608, fax (907) 264-0878.

THE SUPREME COURT OF THE STATE OF ALASKA

SHEILA TARANTO, d/b/a TUNDRA TAXI, Appellant, v. NORTH SLOPE BOROUGH, Appellee.	Supreme Court No. S-8172 Superior Court No. 2BA-92-06 CI OPINION [No. 5217 – December 17, 1999]

Appeal from the Superior Court of the State of Alaska, Second Judicial District, Barrow, Michael I. Jeffery, Judge.

Appearances: Michael A. Stepovich, Stepovich Law Office, Fairbanks, for Appellant. Scott J. Nordstrand, Owens & Turner, P.C., Anchorage, for Appellee.

Before: Matthews, Chief Justice, Compton, Eastaugh, Fabe, and Bryner, Justices.

EASTAUGH, Justice.

I. INTRODUCTION

A North Slope Borough employee wrote and publicly displayed a petition accusing a Barrow taxicab operator of illegal sales of alcohol and drugs. The operator sued

the borough for defamation. The borough successfully moved for complete summary judgment, but we reversed on appeal. Following remand, the borough again successfully moved for complete summary judgment. We affirm, holding that the borough's allegedly "piecemeal" summary judgment motions did not require that its last motion be denied, and that actual malice is the appropriate standard for determining whether government speech on matters of public interest is actionable.

II. FACTS AND PROCEEDINGS

Sheila Taranto owned a taxicab business in Barrow.[1] Around November 1991 Evelyn Donovan, Clerk of the North Slope Borough, drafted a petition concerning Taranto. The petition read:

> We, the undersigned, have knowledge of Sheila Taranti [sic], owner of Tundra Taxi, to sell liquor, marijuana and cocaine. This will authorize Public Safety to interview us to document her illegal sale of liquor, marijuana, and cocaine or attest to the fact that I have been witness to her illegal activities.

The petition contained space for persons to write their names, addresses, and telephone numbers.

Before drafting the petition, Donovan contacted James E. Christensen, the borough's Director of Public

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[1] For the facts underlying this appeal, *see* our earlier opinion, *Taranto v. North Slope Borough*, 909 P.2d 354 (Alaska 1996) (*Taranto I*).

Safety, to tell him what she planned to do. After Christensen " 'g[a]ve the okay' for the idea," Donovan typed the petition on her office computer and made at least one copy of it. She then placed the petition in the front reception area at the borough's Administration and Finance Building, where it remained for about one month. After twenty-two people signed the petition, Donovan delivered it to Christensen.

In January 1992 Taranto sued the borough for defamation. The borough moved for summary judgment in December 1992. The superior court granted the motion, concluding that the borough was not directly liable for the petition and that the borough could not be held liable under the doctrine of respondeat superior. Taranto appealed, and we reversed, holding that genuine issues of material fact precluded summary judgment under both theories of liability.[2]

Upon remand the borough retained new counsel and requested a continuance to March or April 1997. It also requested that the court extend the deadline for dispositive motions to January 6, 1997. Taranto filed a written non-opposition to the continuance motion and did not file an opposition to the extension motion. The superior court granted both of the borough's requests.

In October 1996 the borough moved for summary judgment on the issue of punitive damages. Taranto filed a written non-opposition to that motion, and the superior court granted summary judgment dismissing Taranto's punitive damages claim.

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[2] *See id.* at 360.

In January 1997 the borough moved to establish as law of the case a requirement that Taranto prove "actual malice" to prevail on her defamation claim. The borough concurrently moved for summary judgment, arguing that Taranto could not establish actual malice. The superior court granted both motions and dismissed Taranto's defamation claim. Taranto appeals.

III. DISCUSSION

A. Standard of Review

Taranto first argues that allowing the borough to file the January 1997 motion for summary judgment was error because it violated a policy against piecemeal litigation. We review this procedural issue for abuse of discretion.[3]

Taranto next asserts that one need not prove actual malice in a defamation suit against a government defendant, and that the superior court consequently erred in granting summary judgment to the borough. We review a grant of summary judgment using our independent judgment.[4] We must decide whether any genuine issue of material fact exists and whether the moving party was entitled to judgment as a matter of law.[5]

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[3] *See S & B Mining Co. v. Northern Commercial Co.*, 813 P.2d 264, 269 (Alaska 1991).

[4] *See Taranto I*, 909 P.2d at 355.

[5] *See id.*

To the extent this court deals with legal issues of first impression, we will adopt the rule of law that is most persuasive in light of precedent, reason, and policy.[6]

B. Did the Superior Court Abuse Its Discretion in Allowing the Borough to File a Third Motion for Summary Judgment?

Taranto argues that allowing the borough's third motion for summary judgment to raise the "actual malice defense" encourages piecemeal litigation.[7] She claims that the borough's answer raised "actual malice" as a defense nearly four years before, and that the borough's two earlier summary judgment motions could have argued the defense. The borough counters that the timing of motion practice is within the trial court's discretion.

Taranto did not oppose the borough's request for an extension in which to file dispositive pre-trial motions, and the borough filed its last summary judgment motion within the thus-extended time period. We consequently conclude that Taranto waived any procedural objection to filing this summary judgment motion. The superior court did not abuse its discretion in reaching the same conclusion.

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[6] *See Guin v. Ha*, 591 P.2d 1281, 1284 n.6 (Alaska 1979).

[7] Strictly speaking, actual malice is not a "defense." It has been said that a public figure suing for defamation "has the burden of alleging and proving that the defendant had knowledge or acted in reckless disregard." Restatement (Second) of Torts sec. 580A cmt. e (1977).

Moreover, the law is contrary to Taranto's argument. Alaska Civil Rule 56 addresses the timing of motions for summary judgment. It provides that parties defending against claims "may, *at any time*, move for a summary judgment."[8] Rule 56 does not limit the number of times a party may move for summary judgment.

This court has never limited the number of times a party may move for summary judgment. As the borough notes, the cases Taranto cites to establish a doctrine of avoiding piecemeal litigation concern the avoidance of multiple appeals or the relitigation of issues, not successive summary judgment motions.[9]

Because Rule 56 and Alaska case law do not preclude successive motions for summary judgment, and because Taranto waived her right to object, we hold that the superior court did not abuse its discretion in allowing the borough to file its final summary judgment motion.

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[8] Alaska R. Civ. P. 56(b) (emphasis added); cf. Alaska R. Civ. P. 56(a) (concerning summary judgment motions by claimants).

[9] *See S & B Mining*, 813 P.2d at 269 (holding that court did not violate policy against piecemeal litigation where court granted Civil Rule 54(b) judgment for several parties in multiple party action because remaining parties could not relitigate issues previously decided on summary judgment); *Young v. State*, 491 P.2d 122, 126-27 (Alaska 1971) (holding that trial court should rule on negligence before ruling on contributory negligence, to avoid prompting unnecessary appeals); *McCoy v. Alaska Brick Co.*, 389 P.2d 1009, 1011 (Alaska 1964) (holding that trial judge should have ruled on motion for new trial so it could be reviewed with other decision on appeal); *Snipes v. March*, 378 P.2d 827, 829 (Alaska 1963) (holding that trial court should have ruled on motion for new trial along with motion for directed verdict).

C. Must Taranto Prove Actual Malice in Her Defamation Claim Against the Borough?

The superior court granted summary judgment to the borough on Taranto's defamation claim, reasoning that actual malice is the standard for determining whether the borough abused, and lost, its conditional right to speak. The court found no genuine issues of material fact under that standard.

Taranto argues on appeal that the First Amendment does not protect defamatory governmental speech, and that it was therefore error for the superior court to apply an actual malice requirement and to grant summary judgment to the borough. The borough argues that the First Amendment protects governmental speech, subject to an actual malice standard, and that moreover, it had a conditional privilege to speak on matters of public interest.

Some courts have held that the First Amendment does not protect government speech.[10] Indeed, Justice Stewart observed that "[t]he First Amendment protects the press *from* governmental interference; it confers no analogous protection on the Government."[11]

We need not decide here whether the United States or Alaska constitutions protect government speech, because

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[10] *See Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634, 638 (11th Cir.1990); *NAACP v. Hunt*, 891 F.2d 1555, 1565 (11th Cir.1990); *Student Gov't Ass'n v. Board of Trustees of Univ. of Mass.*, 868 F.2d 473, 481 & n.10 (1st Cir.1989); *Estiverne v. Louisiana State Bar Ass'n*, 863 F.2d 371, 379 (5th Cir.1989).

[11] *See Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 (1973) (Stewart, J., concurring).

this court has held that the common law confers a conditional privilege on speech addressing matters of public health and safety.[12] We do not need to consider whether a constitutional privilege applies if we conclude that a common law privilege applies. Undoubtedly the speech attributed to the borough here dealt with matters of public health and safety. Does a common law privilege apply?

Our decisions point to two different analytical models potentially applicable here.

We considered an equivalent claim in *Urethane Specialties, Inc. v. City of Valdez*.[13] There, the City of Valdez published partly false warnings about the safety of urethane foam installation, prompting an installer to sue.[14] We recognized that "the common law provides for privileges in various situations in which public policy requires that a speaker be accorded immunity for the making of defamatory statements. . . . 'Each such privilege is conditional upon the existence of a state of facts which make it in the public interest to protect the person speaking or writing. . . . ' "[15]

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[12] *Urethane Specialties, Inc. v. City of Valdez*, 620 P.2d 683 (Alaska 1980); *Pearson v. Fairbanks Publ'g Co.*, 413 P.2d 711 (Alaska 1966); *Fairbanks Publ'g Co. v. Francisco*, 390 P.2d 784, 793 (Alaska 1964).

[13] 620 P.2d 683 (Alaska 1980).

[14] *See id.* at 684-87.

[15] *Id.* at 689 (quoting *Francisco*, 390 P.2d at 793).

This court then adopted, for situations "like the one under consideration,"[16] the privilege described in the Restatement (Second) of Torts sec. 598A: "An occasion makes a publication conditionally privileged if an inferior administrative officer of a state or any of its subdivisions makes a defamatory communication required or permitted in the performance of his official duties."[17] But this privilege can be lost. We held that Restatement (Second) of Torts sec. 600 determines whether the conditional privilege accorded certain government speech is lost through abuse.[18] The standard set out in sec. 600 is the equivalent of the actual malice standard.

Applying the *Urethane Specialties* analysis to this case would require us to affirm the borough's summary judgment. There are no genuine factual disputes about whether the petition concerned matters of public interest, whether the borough acted without actual malice, and whether the persons whose conduct is attributed to the borough acted with authority or permission.

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[16] *Id.* at 689.

[17] *Id.; see also* Restatement (Second) of Torts sec. 598A (1977).

[18] *See Urethane Specialties,* 620 P.2d at 689-90. The Restatement (Second) of Torts sec. 600 provides: "[O]ne who upon an occasion giving rise to a conditional privilege publishes false and defamatory matter concerning another abuses the privilege if he (a) knows the matter to be false, or (b) acts in reckless disregard as to its truth or falsity." *See also* Restatement sec. 598A, cmt. 1 (specifying other ways privilege can be lost).

Although applying that approach would require affirmance here, in many cases it may raise questions about the speaker's authority and permission.[19]

Our decisions discuss an alternative approach that applies broadly to speech on matters of public concern. We think that this alternative analysis encompasses cases of allegedly defamatory governmental speech. It also avoids the issue, inherent in Restatement sec. 598A, of the speaker's authority or permission. This alternative is discussed in two cases cited by the borough. The borough invokes *Fairbanks Publishing Co. v. Francisco*[20] to support its argument that government speech is protected, and *Pearson v. Fairbanks Publishing Co.*[21] to support its argument that a plaintiff must prove actual malice in all defamation suits involving speech on matters of public concern.

In *Francisco*, a discharged firefighter sued a Fairbanks newspaper for printing a letter by the city manager that outlined the alleged details surrounding his firing.[22] Although the defendant was a newspaper, this court went out of its way to recognize that "judicial officers, attorneys, witnesses, jurors, legislators, government executive officers and others are accorded the absolute privilege of publishing false and defamatory matter within certain limitations . . . whenever it is necessary for the protection

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[19] *See* Restatement (Second) of Torts sec. 598A (requiring that the communication be "required or permitted in the performance" of the government officer's official duties).

[20] 390 P.2d 784 (Alaska 1964).

[21] 413 P.2d 711 (Alaska 1966).

[22] *See Francisco*, 390 P.2d at 787.

of one's own interest, the interest of third persons, or the interests of the public."[23] This dictum acknowledged that the common law privilege could extend to government speakers, while leaving unresolved what those "certain limitations" on the privilege might be.

In *Pearson*, we emphasized that for matters of public interest, the "actual malice" standard from *New York Times v. Sullivan* should apply.[24] There, a syndicated newspaper columnist charged that a Fairbanks newspaper editorial libeled him.[25] The court declined to consider the constitutional dimensions of the case, and instead held that if a plaintiff could show "actual malice," then "the privilege that otherwise would be enjoyed in discussion and debate on public questions and issues" would be lost.[26] While the court adopted the United States Supreme Court's definition of "actual malice," it carefully avoided grounding its opinion in any constitutional rights to free speech, focusing instead on the common law conditional privilege.[27]

We read *Francisco* and *Pearson* to stand for the core proposition that speech on matters of public safety is privileged, but that this privilege is conditional and can be lost if the plaintiff proves that the speaker uttered

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[23] *Id.* at 793.

[24] *See Pearson* 413 P.2d at 714-15.

[25] *See id.* at 712.

[26] *Id.* at 715.

[27] *See id.* at 714-15.

untruths with actual malice.[28] Thus, these cases cloak speakers addressing matters of public health and safety with the actual malice conditional privilege. This protection will necessarily extend to a speaker's employer who is alleged to be vicariously liable for its employee's defamatory speech.

IV. CONCLUSION

There is no genuine dispute that the communications concerned matters of public health or safety. Nor is there any basis for finding that Donovan or any borough official acted out of actual malice. Absent genuine, material fact disputes about these issues, the borough was entitled to judgment as a matter of law. The superior court did not err in granting summary judgment to the borough.[29] We therefore AFFIRM the judgment below.

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[28] *See Mt. Juneau Enter. v. Juneau Empire*, 891 P.2d 829, 837-38 (Alaska 1995) (applying actual malice standard to article on matter of public interest).

[29] Because we affirm the borough's summary judgment, it is not necessary to consider the borough's argument that the protection the government enjoys is absolute, and not merely conditional.

APPENDIX B

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
SECOND JUDICIAL DISTRICT AT BARROW

SHEILA TARANTO, d/b/a
TUNDRA TAXI,

Plaintiff,

vs.

NORTH SLOPE BOROUGH,

Defendant.

Case No. 2BA-92-06 CI

MEMORANDUM AND ORDER AS TO DISPOSITIVE MOTIONS

(Filed Mar. 17, 1997)

The North Slope Borough has filed motions to establish that "actual malice" is the standard for any liability in this case and for summary judgment that Sheila Taranto has not met this standard. Ms. Taranto argues that the motions are untimely, the actual malice standard is inapplicable to this case, and that if the actual malice standard does apply, genuine issues of material fact exist. Upon consideration of the memoranda and the files and records of this case, the Court is granting summary judgment to the North Slope Borough.[1]

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[1] This Court earlier granted the motion for summary judgment filed by the North Slope Borough as to its liability, directly or indirectly, for publication of the petition. This ruling was reversed by the Alaska Supreme Court. *Taranto v. North*

II. FACTS AND PROCEEDINGS

This litigation is a defamation suit brought by Sheila Taranto, owner of Tundra Taxi ("Taranto"), against the North Slope Borough, arising out of a petition drafted by a Borough employee and placed at the reception desk of the main Borough administrative office. The facts, as summarized by the Alaska Supreme Court in its opinion on the separate issue of whether the Borough could be held liable for the actions of the Borough Clerk, are as follows:

> . . . Sheila Taranto lives in Barrow where she owns a taxi cab business. Sometime during November, 1991, Taranto became aware that a petition regarding her had been drafted and displayed at the Borough's Administrative and Finance Office Building. The petition read as follows:
>
> > We, the undersigned, have knowledge of Sheila Taranti [sic], owner of Tundra Taxi, to sell liquor, marijuana and cocaine. This will authorize Public Safety to interview us to document her illegal sale of liquor, marijuana and cocaine or attest to the fact that I have been a witness to her illegal activities.
>
> There were lined spaces below for interested persons to write their names, addresses and

---

Slope Borough, 909 P.2d 354 (Alaska 1996). The motions now before the Court discuss the preliminary issue of whether the allegations by Ms. Taranto are sufficient to satisfy the elements of actionable defamation. This issue is separate from and unaffected by the Supreme Court's ruling that summary judgment could not be granted on the general issue of the Borough's liability for Evelyn Donovan's actions.

> phone numbers. The petition was prepared by Evelyn Donovan. At the time, Donovan worked as Borough Clerk for the North Slope Borough.
>
> Before proceeding to formulate and type the petition Donovan contacted James E. Christensen, the Director of Public Safety for the North Slope Borough, to inform him about the proposed petition. After Christensen "g[a]ve the okay" for the idea, Donovan typed the petition on her office computer and make at least one copy of it. It was then placed in the front reception area of the Borough Administration and Finance Building where it could be viewed by anyone entering or leaving the building. The petition remained at this location for approximately one month. After obtaining twenty-two signatures, Donovan delivered the petition to Christensen.

Taranto v. North Slope Borough, 909 P.2d 354, 355 (Alaska 1996) (alterations in original) (footnote omitted).[2]

II. DISCUSSION

a. The Borough's motions are timely. Taranto argues that the Borough's motions are untimely, citing a pretrial order issued by the Court on July 20, 1996, setting

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[2] The Supreme Court remanded the case to this Court, based on the Supreme Court's finding that "a fact-finder could reasonably infer that the formulation and publication of the petition represented official Borough policy" and that Taranto had raised a genuine issue regarding the capacity in which Donovan acted "when she composed, typed, obtained approved for, circulated, and presented the petition to Jim Christensen, the Borough's Director of Public Safety." 909 P.2d at 357, 358 n.9.

a deadline of November 1, 1996, for the filing of dispositive motions. She argues that there has been extensive motion practice in this case and that the issues not being raised by the Borough are not new and could have been raised before. She concludes that "fairness and equity should preclude the Defendant from asserting claims in a piecemeal fashion designed to economically overwhelm the Plaintiff in this case." *Response to Motion To Determine Law of the Case and for Summary Judgment*, January 30, 1997, at 2.

Taranto's argument overlooks the records of this case. The Borough filed a motion to continue on October 25, 1996, based on the fact that the Borough had substituted in outside counsel for this case. The motion requested a continuance of the trial until "March or April, 1997," an adjustment of the present pretrial dates to correspond to the new trial date, and "specifically request[ed] that the deadline for filing dispositive motions be extended to at least January 6, 1997." *Memorandum in Support of Motion for Continuance by Defendant North Slope Borough*, October 25, 1996, at 2. Taranto entered her non-opposition to the motion to continue on November 1, 1996. The Court vacated the existing trial date and set on a status conference on November 22, 1996. Based on the status conference and Ms. Taranto's non-opposition, an order 1) continuing the trial, 2) establishing January 6, 1997, as the deadline for dispositive motions, and 3) stating that a new pretrial order would issue based on the new trial date, was signed by the Court on December 23, 1996. The motions were faxed to the Court and served on Taranto's counsel on January 6, 1997.

Taranto waived any issue as to "piecemeal litigation" when she entered her non-opposition to the Borough's request to continue the trial, which contained the specific request to establish January 6, 1997, as the due date for dispositive motions. The Borough's motions have been timely filed.

b. The actual malice standard of liability applies to this case. Although the Alaska cases are dispositive on this point, a discussion of relevant United States Supreme Court authority as to defamation actions is necessary to an understanding of the Alaska precedent. The seminal case of *New York Times Co. v. Sullivan*, held that

> [t]he constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

376 U.S. 254, 279-280 (1964). The opinion also acknowledged that when public officials are sued for libel, the officials "are protected unless actual malice can be proved." *Id.*, at 282 (citing *Barr v. Matteo*, 360 U.S. 564, 571 (1959). The Court subsequently extended that "actual malice" standard to statements made about public figures, *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967), and to issues of public concern, *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971). The *Rosenbloom* plurality held that

> We honor the commitment to robust debate on public issues, which is embodied in the First

> Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.

403 U.S. at 43-44.[3]

The U.S. Supreme Court late abandoned this position in *Gertz v. Robert Welch, Inc.*, holding that the *New York Times* standard was limited to statements about public officials and public figures. 418 U.S. 323, 342-43 (1974). The opinion concluded that private persons are more vulnerable to injury and more deserving of recovery because of the lack of effective opportunities for rebuttal by private individuals and the voluntary exposure to public comment by public officials and public figures. 418 U.S. at 344-46. Consequently, the Court held that "the extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge [the] legitimate state interest" in providing legal remedies to private individuals injured by defamatory statements. *Id.*, at 345-46. Stating that these considerations supported allowing more flexibility for the states to develop their own common law in this area, the Court held that "so long as they do not impose liability without fault, the States may

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[3] The Court reasoned that "[i]f a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety." 403 U.S. at 43.

define for themselves the appropriate standard of liability for a publisher of broadcaster of defamatory falsehood injurious to a private individual." *Id.*, at 347.[4]

The Alaska Supreme Court has exercised the discretion granted to it by the *Gertz* case by retaining the requirement of proof of actual malice in situations involving issues of "public concern." Prior to *Gertz*, the Court had applied the *Rosenbloom* holding to require a showing of "actual malice" in a libel action against a newspaper that had alleged that certain Nome cab drivers were selling intoxicating beverages to minors. *West v. Northern Publishing Co.*, 487 P.2d 1304, 1306 (Alaska 1971). The Court had held that distribution of alcoholic beverages to minors was "a matter of public or general concern." *Id.*, at 1306 n.5.

Following the publication of the *Gertz* opinion, the Alaska court reaffirmed that actual malice applied to defamation actions involving issues of public concern in *Doe v. Alaska Superior Court*, 721 P.2d 617, 627 (Alaska 1986) ("We have afforded defendants only a qualified privilege, which requires a plaintiff to prove that a defamatory statement concerning a matter of public interest was published with 'actual malice' in order to recover damages."). The Court again reaffirmed the requirement for proof of actual malice in a libel case involving an issue of public concern in *Mount Juneau Enterprises, Inc. v. Juneau Empire*, 891 P.2d 829, 837 (Alaska 1995) ("We further protect the free exchange of ideas by applying the

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[4] The Court limited recovery of damages based on a less stringent standard than the *New York Times* test to damages "sufficient to compensate him for actual injury." *Id.* at 350.

actual malice standard to publications on issues of public interest and concern, even if the defamation plaintiff is not a public figure.").

This case involves an allegation that a cab company driver/owner was distributing liquor, marijuana and cocaine. These statements are remarkably similar to the newspaper article in *West* which reported that in Nome "[s]ome booze is furnished minors by cab companies, which in turn are owned by the liquor interests. Individual proprietors furnish liquor illegally on credit. They sell booze for money, ivory, and even federally food stamps." 487 P.2d at 1304. The *West* court found the newspaper article to be a matter of "public or general concern." *Id.*, at 1306 n.5. The same ruling applies to this case: activities described in the petition displayed at the Borough are of public or general concern, particularly in a community that has exercised its power to restrict the importation and sale of alcoholic beverages through the local option process.

Taranto's argument that she is not a public official or a public figure is inapposite. The Borough is not claiming that she is. Status as a public official or public figure is only one of two situations triggering application of the actual malice standard. Involvement with an issue of public concern also requires application of the actual malice standard, whether or not the person involved is a public figure. *See, Mount Juneau Enterprises*, 891 P.2d at 837-38.[5]

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[5] This standard applies regardless of the fact that the Borough is not a media defendant. *Doe*, 721 P.2d at 628 n.15 (the

For the above reasons, the law to be applied in this case is that Sheila Taranto must show that Evelyn Donovan arranged for the display of the petition with "actual malice," *i.e.*, with " 'knowledge that it was false or with reckless disregard of whether it was false or not.' " *West*, 487 P.2d at 1305 (quoting *New York Times*, 376 U.S. at 280).

c. **As a matter of law, Taranto has failed to show "actual malice" in this case.** The Alaska Supreme Court has held that

> [a]ctual malice exists when it is proved that the defamatory statement was made with knowledge that it was false or with a reckless disregard of whether it was false or not. Under this meaning of the term, the use of the knowingly false statement or the false statement made with reckless disregard of the truth will abuse – thus destroying – the privilege that otherwise would

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qualified privilege in a defamation case applies to all "persons," not just media defendants). Taranto argued for the first time at oral argument that a borough is not a "person" entitled to the protections of the actual malice standard in a defamation case. *Matanuska-Susitna Borough School Dist. v. State*, Slip. Op. 4470 (Alaska Jan. 31, 1997) at 3 n.2 (*citing, Fairbanks No. Star Bor. v. State*, 753 P.2d 1158, 1160 (Alaska 1988) *and Kenai Peninsula Borough v. State, Dep't of Community and Regional Affairs*, 751 P.2d 14, 18-19 (Alaska 1988). The *Kenai* opinion contained the original holding of our Supreme Court that boroughs are not "persons" entitled to the protection of the Alaska Constitution as to equal protection and due process of laws *as to actions of other units of state government*. There is no suggestion in these cases that boroughs are not entitled to protections of the "actual malice" standard in a defamation action brought by a citizen. Since Taranto is not a unit of state government, these case are not helpful to her claims in this case.

> be enjoyed in discussion and debate on public questions and issues.

Pearson v. Fairbanks Publishing Co., 413 P.2d 711, 715 (Alaska 1966), (citing *New York Times*, 376 U.S. at 279-280). In order to overcome the qualified privilege afforded to libel defendants who have commented on matters of public interest, a plaintiff must show actual malice "with convincing clarity." *Doe*, 721 P.2d at 628.

The Court gave the following analysis of the necessary proof to show "actual malice" in the case of *Moffat v. Brown*, a case in which a public figure was alleging defamation:

> To establish actual malice, a public figure must prove by clear and convincing evidence that the declarant acted with knowledge of the statement's falsity or in reckless disregard of the statement's truth or falsity or in reckless disregard of the statement's truth or falsity. the actual malice standard is a difficult one to satisfy. Not only is the burden of proof on the plaintiff to show actual malice by *clear and convincing evidence*, but also, the standard is a subjective one. As the Court in *St. Amant v. Thompson* explained,
>
> > These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the *defendant in fact entertained serious doubts as to the truth of his publication*. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

Moffat v. Brown, 751 P.2d 939, 941 (Alaska 1988) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)) (emphasis in *Moffat* opinion) (citations omitted). The Court reaffirmed in *Moffat* its earlier definition of reckless disregard as " 'conduct that is heedless and shows a wanton indifference to the consequences; it is conduct which is far more than negligent. There must be sufficient evidence to permit the inference that the defendant must have, in fact, *subjectively entertained serious doubts as to the truth of his statement.*' " *Id.*, at 942, (*quoting, Green v. Northern Publishing Co.*, 655 P.2d 736, 742 (Alaska 1982) (citations omitted by *Moffat*) (emphasis in *Green*).

The *Moffat* opinion held that a movant for summary judgment in a defamation case only has to show that there is no genuine issue of material fact that the movant is entitled to judgment as a matter of law. 751 P.2d at 942-44.[6] The question of whether the privilege has been abused is a jury question; however, the issue does not go to the jury if "the facts are such that only one conclusion can reasonably be drawn." *Schneider v. Pay 'N Save Corp.*, 723 P.2d 619, 624 (Alaska 1986). Since Taranto is opposing the motion for summary judgment, all reasonable factual

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[6] The Court declined to follow a United States Supreme Court opinion that incorporated into requirements of federal civil procedure the clear and convincing evidence standard into the standards for resolving a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 255-56 (1986) (in an actual malice case, "the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.").

inferences must be drawn in her favor. *Sharpe v. Trail*, 902 P.2d 304, 306 (Alaska 1995).

The Borough argues that the petition did not allege illegal activity by Taranto, but merely requested that other [sic] provide to Public Safety any information that they had regarding such activities. *Memorandum In Support of Third Motion for Summary Judgment by Defendant North Slope Borough*, January 7, 1997, at 8-9. Viewing the evidence in Taranto's favor, the Court finds that a reasonable jury could find that the underlying premise – or a reasonable inference – of the petition was that Taranto was guilty of illegal conduct. The Supreme Court has also held that a reasonable jury could find that Ms. Donovan's actions were official Borough policy. *Taranto*, 909 P.2d at 359. Of course, no civil or criminal trial has ever tested the accuracy of either of these findings – by issuing this decision, the Court is making no finding as to their validity.

These unresolved issues do not address the central issue presented by the motions now before the Court: the mental state of Ms. Donovan. A review of Taranto's pleadings provides *no* evidence that Ms. Donovan placed the petition at the reception desk with "actual malice." Taranto opposed the motion on timeliness grounds and on the argument that the actual malice standard is in applicable. [sic] Nowhere does Taranto allege that the Borough, or its employees, knew that the allegations of the petition were false or entertained serious doubts about the veracity of the petition.

Ms. Donovan testified in her deposition that she had personal knowledge of Taranto's illegal activities. *Deposition of Evelyn Donovan*, March 25, 1992, at 15-17, 55-57. Donovan's personal knowledge was buttressed by the similar statements made to her by others prior to the display of the petition, and by the fact that prior to the display of the petition, public Safety had asked Donovan to participate in a sting operation against Taranto thereby showing its suspicious that Taranto was acting illegally. *Id.*, at 26-27, 38, 55, 57. Taranto offers no argument challenging [sic] seriously challenging these factors or otherwise pointing to the existence of serious doubts on the part of the Borough or its employees.

The only arguments that Taranto makes on the merits of her claim in her opposition to this motion are contained in the following statements: "[t]he pleadings clearly assert that these allegations are false" and "[t]he statements by the Borough in this case are defamatory in actuality and as viewed in a light most favorable to the Plaintiff." *Response to Motion To Determine Law of the Case and for Summary Judgment*, January 30, 1997, at 4-5.

The Borough correctly argues that an opposition to a motion for summary judgment may not rest on such general allegations in a memorandum. The summary judgment procedure is "[i]ntended to eliminate by exposure superficial issues created by innuendo instead of direct allegations." *Alaska-Canadian Corp. v. Ancow Corp.*, 434 P.2d 534, 538 (Alaska 1967). Alaska Civil Rule 56(e) clearly states that an opposition "may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as

otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

Ms. Taranto has failed to make this showing. She has not raised a genuine issue of material fact as to whether the Borough or its employees knew or recklessly disregarded the alleged falsity of the petition. On this issue – although Taranto alleges that the Borough "maliciously and wrongfully published" the petition by leaving the document at the reception desk,[7] she does not specifically allege the requisite mental state to meet the actual malice standard, let alone set forth specific facts (by affidavits or other acceptable means under Civil Rule 56(e)) showing a genuine factual issue as to actual malice. The Borough is therefore entitled to summary judgment as a matter of law as to Ms. Taranto's claim for defamation.

III. CONCLUSION

The North Slope Borough's Motion to Determine Law of the Case and its Third Motion for Summary Judgment are timely because the Court received the faxed pleading on the deadline specified in there advised pretrial order of December 22, 1997, signed *nunc pro tunc* to November 22, 1997. Since the petition addresses alleged alcohol and drug dealing by a cab driver, it discusses an issue of "public concern". The law of the case is established that Ms. Taranto must show the Borough acted with "actual malice" in displaying the petition in order to prevail on her defamation claim. Ms. Taranto has filed to raise a genuine issue of material fact that actual malice was

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[7] *Complaint for Defamation*, January 18, 1992, at 2.

present when the petition was prepared and displayed; therefore, the Borough is entitled to summary judgment dismissing her claims.

IT IS THEREFORE ORDERED that the North Slope Borough's Motion to Determine Law of the Case and Motion for Third Summary Judgment are **GRANTED.**

IT IS FURTHER ORDERED that all of Sheila Taranto's claims against the North Slope Borough are **DISMISSED WITH PREJUDICE.**

IT IS FURTHER ORDERED that as the prevailing party, the North Slope Borough may seek an award of costs and attorney's fees. Alaska Civil Rule 79, 82.

Effective Date: March 17, 1997

ENTERED AT Barrow, Alaska, this 17 day of March, 1997.

[SEAL]
/s/ Michael I. Jeffery
Michael I. Jeffery
Superior Court Judge

I certify that copies
distributed by fax to:
Stepovich/Nordstrand/Leveque on
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Supreme Court, U.S.
FILED
APR 21 2000
CLERK

No. 99-1538

IN THE

Supreme Court of the United States

SHEILA TARANTO, d/b/a TUNDRA TAXI,

Petitioner,

v.

NORTH SLOPE BOROUGH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the actual malice standard established in *New York Times Company v. Sullivan*, 376 U.S. 254 (1964), protect government speech?

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OPINIONS BELOW

The decision of the Alaska Supreme Court is reported at *Taranto v. North Slope Borough*, 992 P.2d 1111 (Alaska 1999) ("Taranto II"). *See also* Pet. App. A, pp. 1-12.

The order determining the law of the case and granting summary judgment to the North Slope Borough by the Alaska Superior Court for the Second Judicial District at Barrow, Alaska is unpublished. *See* Pet. App. B, pp. 13-27.

STATEMENT OF JURISDICTION

This Court lacks jurisdiction to review the decision of the Alaska Supreme Court in *Taranto II* under 28 U.S.C. § 1257(a) because that decision was based upon independent and adequate state law grounds. *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983), and discussion below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. U.S. Const. amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

II. Alaska Const. art. I, § 5

Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

III. Alaska Stat. § 09.50.250

A person or corporation having a contract, quasi-contract, or tort claim against the state may bring an action against the state in a state court that has jurisdiction over the claim. A person who may present the claim under AS 44.77 may not bring an action under this section except as set out in AS 44.77.040(c). A person who may bring an action under AS 36.30.560 - 36.30.695 may not bring an action under this section except as set out in AS 36.30.685. However, an action may not be brought under this section if the claim

. . . .

(3) arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

IV. Alaska Stat. § 09.65.070

(a) Except as provided in this section, an action may be maintained against a municipality in its corporate character and within the scope of its authority.

. . . .

> (d) An action for damages may not be brought against a municipality or any of its agents, officers, or employees if the claim
>
> . . . .
>
> (2) is based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty by a municipality or its agents, officers, or employees, whether or not the discretion involved is abused.

STATEMENT OF THE CASE

I. Background

Petitioner Sheila Taranto ("Taranto") operated a taxi business in Barrow, Alaska in 1991. At that time Evelyn Donovan ("Donovan") was the Borough Clerk for Respondent North Slope Borough ("NSB"). NSB is a unit of local government established pursuant to the Alaska Constitution and Alaska Statutes. Alaska Const. art. X, § 3; Alaska Stat. § 29.05.031.[1]

---

1. NSB is the largest municipality in the United States in terms of land mass, encompassing 89,000 square miles of Alaska land north of the Arctic Circle. It has a small population of approximately 7,500 people, nearly seventy percent of whom are Inupiat Eskimos. Of this number, more than half (approximately 4600 people) live in Barrow, the northern most city in the United States and the NSB seat of government. The remainder live in several villages spread throughout the NSB. *See generally* North Slope Borough 1998/99 Economic Profile and Census Report, North Slope Borough Department of Planning and Community Services.

Sometime in the fall of 1991, Donovan drafted a petition with lines for signatures under the following statement:

> We, the undersigned, have knowledge of Sheila Taranti [sic], owner of Tundra Taxi, to sell liquor, marijuana and cocaine. This will authorize Public Safety to interview us to document her illegal sale of liquor, marijuana and cocaine or attest to the fact that I have been a witness to her illegal activities.[2]

The petition was placed in the front reception area of the NSB Administration and Finance Building for approximately one month. Twenty-two persons signed the petition and Donovan thereafter delivered it to the NSB Public Safety Director.

II. Taranto's Suit and First Appeal to the Alaska Supreme Court

In January, 1992, Taranto filed a Complaint for Defamation alleging that NSB, through its agents, "caused the composition, writing and printing of a certain petition, containing false and defamatory matter concerning Plaintiff, namely, her selling liquor, marijuana and cocaine." Taranto further claimed that a second defamatory petition was also published, alleging that she engaged in acts of prostitution. She sought an award of compensatory damages for injury to her reputation, pain and suffering incident thereto, and economic losses to her taxi business. She also requested an award of punitive damages.

---

2. The petition itself did not accuse Taranto of illegal conduct, as she claims in her brief. Pet. Br., p. 2. Rather, the petition gave citizens the opportunity to provide information concerning any illegal conduct.

NSB answered the complaint and asserted several affirmative defenses, including: (1) lack of legal responsibility for the individual acts alleged; and (2) lack of requisite "actual malice." In December, 1992, NSB moved for summary judgment on the first of these defenses — the question of its legal responsibility for the alleged acts of Donovan and certain other NSB employees about which Taranto complained. Alaska Superior Court Judge Michael I. Jeffery granted the motion.

Taranto appealed and the Alaska Supreme Court reversed, concluding that genuine issues of material fact existed as to NSB's liability for its employees' acts -- under both direct and vicarious theories. *See Taranto v. North Slope Borough*, 909 P.2d 354, 360 (Alaska 1996) ("Taranto I").

III. Remand and Taranto's Second Appeal to the Alaska Supreme Court

After remand, NSB filed a motion to establish the law of the case and a related motion for summary judgment on the second affirmative defense. NSB first sought an order establishing that Taranto must prove "actual malice" on its part in order to prevail on her defamation claim. Assuming the success of that motion, NSB concurrently sought summary judgment on the question of its actual malice.

On March 17, 1997 Judge Jeffery issued a memorandum and order on the pending motions, which dismissed Taranto's defamation claim against NSB. Pet. App. B, pp.13-27. Relying upon *West v. Northern Publishing Company*, 487 P.2d 1304 (Alaska 1971), and related Alaska case law on defamation, he held that Taranto was required to prove actual malice in order to prevail because the alleged defamatory statements involved matters of "public or general concern."

Pet. App. B, pp. 20-21. *See also West*, 487 P.2d at 1305-06 (applying the "public concern" doctrine).[3] Judge Jeffery found that Taranto presented no evidence of actual malice by NSB.

> Taranto opposes the motion . . . on the argument that the actual malice standard is in applicable [sic]. Nowhere does Taranto allege that the Borough, or its employees, knew the allegations of the petition were false or entertained serious doubts about the validity of the petition.

Pet App. B, p. 24. As such, judgment was entered against Taranto on April 3, 1997.

Taranto once again appealed to the Alaska Supreme Court. She asserted that the Superior Court erred in requiring proof of actual malice by NSB. Specifically, Taranto argued

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3. The *West* court relied upon Justice Brennan's conclusion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971):

> We thus hold that a libel action . . . by a private individual . . . for a defamatory falsehood . . . [involving] an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not.

Id. at 52 (footnote omitted). *See West*, 487 P.2d at 1305-06. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court rescinded the *Rosenbloom* "public concern" doctrine in favor of a "public figure" analysis. *Id.* at 345-48. However, *Gertz* specifically reserved to the states the right to retain such a standard under state law. *Id.* at 347-48. The Alaska Supreme Court has steadfastly taken that path, based upon the common law privilege discussed below. *See Mount Juneau Enters., Inc. v. Juneau Empire*, 891 P.2d 829, 837-38 (Alaska 1995).

that governmental units do not enjoy the protection of the First Amendment or the Alaska constitutional free expression clause and, therefore, the "actual malice" standard should not be required in suits against them, regardless of Alaska's "public concern" doctrine.

NSB argued in response that governmental speech should be afforded protection under both the United States and Alaska constitutions and, as such, the "actual malice" standard should apply to suits against the government on matters of public concern. Alternatively, NSB argued that conditional common law privileges, previously recognized by the Alaska Supreme Court, effectively reach the same result.

On December 17, 1999 the Alaska Supreme Court issued the decision which is the subject of the present Petition for a Writ of Certiorari ("Petition"). While noting that controversy exists concerning whether government speech is protected by the First Amendment, the court completely by-passed the constitutional question raised by the parties.

> We need not decide here whether the United States or Alaska constitutions protect government speech, because this court has held that the common law confers a conditional privilege on speech addressing matters of public health and safety. We do not need to consider whether a constitutional privilege applies if we conclude that a common law privilege applies. Undoubtedly the speech attributed to the borough here dealt with matters of public health and safety.

Taranto II, 992 P.2d at 1114 (footnote omitted). The Alaska Supreme Court identified two separate and distinct common

law privileges which applied to the allegedly defamatory petitions. *Id.* at 1114-15. Having concluded that the government speech in question was conditionally privileged, the Court went on to affirm the Superior Court's decision that Taranto had failed to present competent evidence of "actual malice" sufficient to defeat either privilege. *Id.*

REASONS FOR DENYING THE PETITION

I. This Court Lacks Jurisdiction to Review The Decisions of State Courts Which Are Based Upon Independent and Adequate State Law

Taranto seeks review from this Court pursuant to 28 U.S.C. § 1257(a) which states:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Pet. Br., p. 1.

The Court has long held that its statutory jurisdiction does not extend to the review of state court conclusions on state law issues. Justice Jackson's opinion in *Herb v. Pitcairn*, 324 U.S. 117 (1945), is often cited in this regard:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Murdock v. Memphis*, 20 Wall. 590, 636; *Berea College v. Kentucky*, 211 U.S. 45, 53; *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164; *Fox Film Corp. v. Muller*, 296 U.S. 207. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Id. at 125-26.

Justice Brennan opined that these "state decisions not only cannot be overturned by, they indeed are not even reviewable by, the Supreme Court of the United States. We are utterly without jurisdiction to review such state decisions." Justice William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 501 (1977) (footnote omitted).

More recently, in *Michigan v. Long*, 463 U.S. 1032 (1983), Justice O'Connor noted:

> Respect for the independence of state courts, as well as avoidance of rendering advisory opinions,

> have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. . . . If the state court decision indicates clearly and expressly that it is . . . based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

Id. at 1040-41.

If *Taranto II* is grounded in independent and adequate principles of Alaska law, Taranto's Petition must be denied for lack of jurisdiction.

II. The Decision of the Alaska Supreme Court in *Taranto II* Was Based Upon Independent and Adequate State Common Law Privileges

In *Fairbanks Publishing Company v. Francisco*, 390 P.2d 784 (Alaska 1964), the Alaska Supreme Court held that persons acting in the public interest are afforded certain privileges against defamation claims.

> The law of defamation embodies the important public policy that individuals should generally be free to enjoy their reputations unimpaired by false and defamatory attacks. But there is a well established counter policy that in certain situations there is a paramount public interest permitting persons to speak or write freely without being restrained by the possibility of a defamation action. In such situations the person writing or speaking is said to enjoy a privilege.

> Two general types of privilege are recognized by the law. They are: absolute and conditional or qualified. On the ground that it is in the public interest to do so, judicial officers, attorneys, witnesses, jurors, legislators, government executive officers and others are accorded the absolute privilege of publishing false and defamatory matter within certain limitations. Numerous conditional or qualified privileges are accorded based upon a public policy which recognizes that it is essential that true information shall be given whenever it is reasonably necessary for the protection of one's own interest, the interest of third persons, or the interests of the public. If such protection were not given the fear of persons capable of supplying such information that they might have to answer in damages would prevent its communication. Each such privilege is conditional upon the existence of a state of facts which make it in the public interest to protect the person speaking or writing, even though an individual may be defamed as a result. If the conditional privilege is abused by the writer or speaker it is lost and he must answer for the legal consequences of his publication.

Id. at 793 (footnotes omitted). The privileges identified were not constitutional creations; rather the court relied upon traditional tort concepts to construct these defenses.[4] *See id.* nn. 1-5.

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4. The *Francisco* decision was issued just weeks after this Court handed down *New York Times Company v. Sullivan*, 376 U.S. 254 (1964). The Alaska court made no reference to it.

Two years later in *Pearson v. Fairbanks Publishing Co., Inc.*, 413 P.2d 711 (Alaska 1966), the Alaska Supreme Court revisited the privileges it recognized in *Francisco*. The court went on to explain the purpose and scope of its pubic "public concern" privilege:

> On the one hand there is the interest in safeguarding the right to one's reputation. On the other hand there is the interest in allowing freedom of debate and expression on public questions and issues. We believe that a fair balance of these competing interests is achieved where the law of defamation permits one, without liability for damages, to comment, criticize and pass judgment on statements made by another on an issue or matter of public interest, even if such comment, criticism and judgment involves misstatements of fact — so long as such misstatements are relevant to the subject matter spoken or written about by the one claiming to be defamed and are not shown by him to have been made with actual malice.
>
> . . . .
>
> We are aware of the fact that where matters of public concern are involved the majority of the courts hold that the privilege of public discussion does not extend to misstatements of fact but is limited to opinion, comment or criticism based upon a true statement of fact. We do not follow the majority rule, but hold that the privilege extends to non-malicious misstatements of fact. The distinction between a fact statement and an opinion or comment is so tenuous in most

> instances, that any attempt to distinguish between the two will lead to needless confusion. The basis for the privilege is that it is in the public interest that there be reasonable freedom of debate and discussion on public issues. One should not be deterred from speaking out through the fear that what he gives as his opinion will be construed by a court as inferring, if not actually amounting to, a misstatement of fact.

Id. at 713-14 (footnotes omitted). Although the court adopted the *New York Times* "actual malice" standard for determining whether the "public interest and concern" privilege was abused, *id.* at 715, it did so with a clear understanding that the source of the privilege was Alaska's own common law. *See Taranto II*, 992 P.2d at 1115.

It was in this context that the *Taranto II* court extended the privilege afforded speech on matters of public concern to government speech. The Alaska Supreme Court first reviewed the more narrow (and traditional) governmental privilege reflected in the Restatement (Second) of Torts § 598A (1977) and previously recognized in *Urethane Specialties, Inc. v. City of Valdez*, 620 P.2d 683, 689 (Alaska 1980):

> An occasion makes a publication conditionally privileged if an inferior administrative officer of a state or any of its subdivisions who is not entitled to an absolute privilege makes a defamatory communication required or permitted in the performance of his official duties.[5]

5. The Restatement standard for abuse of this privilege is equivalent to the "actual malice" standard. Restatement (Second) of Torts § 600 (1977).

Taranto II, 992 P.2d at 1114. The court concluded that this privilege alone would justify affirmance of summary judgment in favor of NSB:

> Applying the *Urethane Specialties* analysis to this case would require us to affirm the borough's summary judgment. There are no genuine factual disputes about whether the petition concerned matters of public interest, whether the borough acted without actual malice, and whether the persons whose conduct is attributed to the borough acted with authority or permission.

Id.

Recognizing that the question of the speaker's authority under the Restatement (Second) of Torts § 598A (1977) might prove a troublesome issue in another context, the Alaska Supreme Court next revisited the "public concern" privilege it established in *Francisco* and *Pearson* more than twenty years earlier.

> We read *Francisco* and *Pearson* to stand for the core proposition that speech on matters of public safety is privileged, but that this privilege is conditional and can be lost if the plaintiff proves that the speaker uttered untruths with actual malice. Thus, these cases cloak speakers addressing matters of public health and safety with the actual malice conditional privilege. This protection will necessarily extend to a speaker's employer who is alleged to be vicariously liable for its employee's defamatory speech.

Taranto II, 992 P.2d 1115 (footnote omitted). It was on this basis, as well, that the Alaska Supreme Court affirmed the Superior Court decision, which: (1) imposed the "actual malice" standard on Taranto's defamation claim against NSB; and (2) ultimately dismissed it for lack of evidence.

The decision of the Alaska Supreme Court in *Taranto II* is founded *only* upon principles of Alaska common law. Because it is based entirely upon independent and adequate state law, this Court must reject the Petition for lack of jurisdiction under 28 U.S.C. § 1257(a). Alaska common law principles and their application are not the proper subject of review by this Court.

III. In *New York Times Company v. Sullivan* this Court Recognized the Propriety and Necessity of the Common Law Privileges Relied Upon by the Alaska Supreme Court in *Taranto II*

The central premise of Taranto's Petition is that the exercise of common law privileges by the Alaska Supreme Court somehow offends *New York Times Company v. Sullivan*, 376 U.S. 254 (1964), and its progeny. Pet. Br., pp. 4-10. In fact, Justice Brennan gave thoughtful consideration to the various privileges and immunities available in defense of government speech and weighed them against a citizen's constitutional right to criticize his or her government. 376 U.S. at 282-83. That balance was struck by the "actual malice" standard.

> [A] privilege for criticism of official conduct is appropriately analogous to the protection accorded a public official when *he* is sued for libel by a private citizen. In *Barr v. Matteo*, 360 U.S. 564, 575, this Court held the utterance of a federal

> official to be absolutely privileged if made "within the outer perimeter" of his duties. The States accord the same immunity to statements of their highest officers, although some differentiate their lesser officials and qualify the privilege they enjoy. But all hold that all officials are protected unless actual malice can be proved. The reason for the official privilege is said to be that the threat of damage suits would otherwise "inhibit the fearless, vigorous, and effective administration of policies of government" and "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Barr v. Matteo*, *supra*, 360 U.S., at 571. Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer. See *Whitney v. California*, 274 U.S. 357, 375 (concurring opinion of Mr. Justice Brandeis), quoted *supra*, p. 270. As Madison said, see *supra*, p. 275, "the censorial power is in the people over the Government, and not in the Government over the people." It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves.

376 U.S. at 282-83 (footnotes omitted).

The Alaska Supreme Court's decision in *Taranto II* did not convert "what has been a careful balance and shield of individual speech . . . to a sword which can be wielded with impunity by government against its own citizens." Pet. Br.,

p. 5. Rather, the court maintained the careful balance of expression between the government and its citizenry, which rests at the very foundation of *New York Times Company v. Sullivan*. This Court afforded protection to critics of public officials, in part, because government officials already spoke with the benefit of various privileges and immunities. Preserving that balance is also a compelling reason to deny Taranto's Petition.[6]

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6. It is worthy of note that Alaska statutes specifically prohibit defamation actions against the State of Alaska, while conditionally permitting them against governmental subdivisions, like NSB. Alaska Stat. § 09.50.250(3). NSB is afforded immunity for its discretionary actions under Alaska Stat. § 09.65.070(d)(2). The utility of that defense under the circumstances of this case was not resolved on its merits, owing to summary judgment on other grounds. In any case, it seems axiomatic that if the State of Alaska may statutorily maintain complete immunity against defamation claims, its courts may impose limits on the conditional claims authorized against its units of local government.

CONCLUSION

For all of the forgoing reasons, NSB respectfully requests that Taranto's Petition for a Writ of Certiorari to the Alaska Supreme Court be denied.

Respectfully submitted,

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